1977

Norman G. Carter v. Pauline Carter : Brief of Respondent

Utah Supreme Court

J. Franklin Allred; Attorney for Plaintiff-Appellant;
Phillip V. Christensen; Attorney for Defendant-Respondent;

IN THE SUPREME COURT OF THE

N G. CARTER,

Plaintiff/Appellant,

vs.

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Defendant/Respon

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Appeal from
and for Uta
BALLIF, Ju

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Plaintiff

Sixth East
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IN THE SUPREME COURT OF THE STATE OF UTAH

NORMAN G. CARTER, :

Plaintiff/Appellant, :

vs. : Case No. 15158

PAULINE CARTER, :

Defendant/Respondent. :

:

RESPONDENT'S BRIEF

Appeal from Judgment of the Fourth Judicial District Court, in and for Utah County, State of Utah, THE HONORABLE GEORGE E. BALLIF, Judge, Presiding.

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CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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NORMAN G. CARTER, :

Plaintiff/Appellant, :

vs. : Case No. 15158

PAULINE CARTER, :

Defendant/Respondent. :

:

RESPONDENT'S BRIEF

POINT I

THE DISTRICT COURT WHICH HEARD THE ORIGINAL DIVORCE MATTER CORRECTLY CONTINUED THE OBLIGATION OF THE PLAINTIFF TO PAY ALIMONY.

POINT II

THE DEFENDANT/RESPONDENT SHOULD BE ALLOWED AN ATTORNEYS FEE FOR DEFENSE OF THE APPEAL HEREIN.

AMENDMENT TO STATEMENT OF FACTS

The defendant agrees with the statement of facts of plaintiff as far as such statement goes, but adds some salient facts omitted by plaintiff.

The action started in the Fourth Judicial District Court of Utah County with the designated defendant as plaintiff

(R 84) and the decree of divorce was awarded defendant (R 54-
Thereafter, for some unknown reason, plaintiff commenced an
action in the District Court of Davis County to have the decr
of the District Court of Utah County modified (R 24,25). The
case was removed to Utah County (R 37) and was treated as an
Order to Show Cause in the action originally brought in Utah
County which showed respondent as plaintiff and appellant as
defendant (TR 3).

The plaintiff/appellant showed no change of circum-
stances from the original decree in this matter which awarded
him property of a sales value of at least $45,000.00 (R 54-56
The parties had been married over 30 years at the commencemen
of the divorce trial (R 57)(TR 17) and had had four children
(TR 17). The assets that defendant had at the hearing of the
matter on modification came from the property awarded at the
original divorce hearing (TR 18), and was substantially the
same as that awarded to plaintiff (TR 18). There was no show
that plaintiff/appellant no longer had the assets awarded to
at all at the time of the hearing of the divorce (TR 4). The
same judge who heard the matter for modification heard the
original divorce matter and was familiar with the whole case
(TR 17). The plaintiff/appellant, besides his Geneva Steel p
received $300.00 per month from a VA pension. He had worked
at U. S. Steel Company for 27 years in 1976 and is eligible
for a substantial pension from the U. S. Steel Company (R 34).
The plaintiff/appellant's gross earnings in 1975 through

November 22, 1975, were $17,481.16 (EX 2-P). The trial began December 15, 1975 (R 57). As stated by counsel for plaintiff/appellant, there was no change in circumstances at the time of the hearing for modification (TR 4).

The employment of defendant/respondent is and was temporary only (TR 16,17). The defendant taught school while she was married for seven years only, and would have set aside for retirement about $2,000.00 which might be matched by the state (TR 18)(TR 19). The decision of the Court was that while the defendant/respondent was earning the sums she was able to earn the alimony should be reduced to $100.00 per month (R 14). The defendant/respondent was 57 years old as of November 2, 1976, and would now be 58 years (R 33).

The trial court did not allow defendant/respondent an attorneys fee in this matter (R 14).

ARGUMENT

POINT I

THE COURT BELOW WAS CORRECT IN ITS DECISION.

The Judge of the Fourth Judicial District Court was correct in reducing the amount of alimony from $350.00 per month to $100.00 per month. The Honorable District Judge was familiar with the case, having tried the matter in the first instance. The parties had been married 30 years, had reared four children. The defendant, during the time of her marriage, worked seven years. The plaintiff at the time of the divorce

matter was earning substantially over $17,000.00 per year and in addition had an income from a pension of $300.00 per month. He would be entitled to substantial pension benefits from the U. S. Steel Company. In addition, he received an equal amount of property as was received by the defendant. The defendant had the courage to go out and look for a job which must have been contemplated at the time of the divorce in this matter. The job defendant/respondent did receive was only temporary and at her age she could not expect more than that. It would be unconscionable and unfair for the Court to conclude that she would not be entitled to any alimony and that she would have to deplete the amount awarded her under the decree of divorce and when that was done, become a public charge.

The Trial Court is allowed considerable latitude of discretion and its finding and decree will not be overturned unless there has been a clear abuse of such discretion. In the case of Whitehead vs. Whitehead (1965), 397 P. 2d, 16 Utah 2d 197, on page 988, the Court stated:

> "Due to the prerogatives reposed in him under the law and to his advantaged position, the trial judge must necessarily be allowed a wide latitude of discretion in such matters, and his judgment should not be changed lightly, nor at all unless under the fact shown by the evidence it works a manifest inequity or injustice".

To the same effect are the cases, Lawlor vs. Lawlor, (1952) 121 Utah 201, 240 P. 2d 271; Mitchell vs. Mitchell, (1974), 527 P. 2d 1359, ___ Utah 2d _____; Harding vs. Har-

(1971), 26 Utah 2d 277, 488 P. 2d 308. In the latter case, the husband sought to have an award for alimony reduced. The trial court made some reduction but the husband, not being satisfied, appealed the matter. The Court said as set forth on page 310 as follows:

> "This proceeding seeking to modify the divorce decree is in equity; and it is the prerogative of this court to review the evidence, to make its own findings, and to substitute its judgment for that of the trial court when the ends of justice so require. However, due to the prerogatives and advantaged position of the trial court, we pursue that broad authorization under certain rules of review which are now well established: Its actions are indulged with a presumption of validity and correctness and the burden is upon the appellant to show a basis for upsetting them: either (1) that findings have been made when the evidence clearly preponderates the other way; or (2) that there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or (3) that it appears plainly that there has been such an abuse of discretion that an inequity or injustice has resulted."

Certainly there was no abuse of discretion in the instant case and it is respectfully submitted that the trial court would have been in error if it had terminated alimony.

The cases cited by plaintiff/appellant were decided on their own peculiar facts and it is respectfully submitted that such cases would not be controlling here.

POINT II

THE DEFENDANT SHOULD BE ALLOWED AN ATTORNEY'S FEE FOR THE DEFENSE OF THE APPEAL.

The trial court did not award the defendant an attorney's fee in the matter of the request for a modification. The

defendant has been required to defend the appeal herein and it would seem proper that the Supreme Court should allow an attorney's fee for the use and benefit of defendant's attorney as the plaintiff is well able to respond. It is submitted that the Court could do so under the ruling in the case, Ehninger v. Ehninger (Utah, September 13, 1977), 569 P. 2d 1104. At least an attorney's fee could be set by the trial court.

CONCLUSION

It is respectfully submitted that the trial court was correct in its determination to refuse to terminate alimony and to hold that plaintiff should pay defendant/respondent $100.00 per month as alimony.

This Honorable Court is further urged to direct the allowance of an attorney's fee for the defendant in the defense of the appeal.

Respectfully submitted,

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing to J. Franklin Allred, attorney for plaintiff/appellant, 321 South Sixth East, Salt Lake City, Utah 84102, this 12th day of January, 1978, first class postage prepaid.

Phillip V. Christensen

PHILLIP V. CHRISTENSEN, Attorney